

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD B. MASON,	§	
	§	No. 629, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0410005519
Appellee.	§	

Submitted: December 28, 2011

Decided: March 27, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

**O R D E R**

This 27<sup>th</sup> day of March 2012, upon consideration of the appellant's opening brief and the appellee's motion to affirm, it appears to the Court that:

(1) On January 3, 2005, the appellant, Richard B. Mason, pled guilty to four counts of Forgery in the Second Degree, a class G felony.<sup>1</sup> The record reflects that the appellee, State of Delaware, entered a *nolle prosequi* on twenty-five additional counts of third degree burglary, criminal mischief, forgery, conspiracy and theft.

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<sup>1</sup> Del. Code Ann. tit. 11, § 861(b)(2)(a) (2007).

(2) The statutory maximum sentence on a class G felony is two years at Level V.<sup>2</sup> In this case, the Superior Court sentenced Mason to a total of eight years at Level V (two years for each count) suspended for one year of Level III probation followed by four years of Level I probation, restitution only.<sup>3</sup>

(3) Since his 2005 conviction, Mason has been found in violation of probation (VOP) five times and resentenced. At the fifth and most recent VOP proceeding on November 10, 2011, the Superior Court sentenced Mason to six years at Level V suspended after two years for one year at Level IV VOP Center followed by three years at Level III (hereinafter “the sentence”). This appeal followed.

(4) On appeal, Mason contends that the sentence is inappropriate and will undoubtedly lead to a sixth VOP because he is homeless and cannot comply with the conditions of Level III probation. Mason requests that this Court change the sentence to require that he serve one year at Level IV work release, where he can earn money to pay for housing, instead of one year at Level IV VOP Center.

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<sup>2</sup> See Del. Code Ann. tit. 11, § 4205 (governing sentence for felonies).

<sup>3</sup> See Del. Code Ann. tit. 11, § 4333(d)(3) (providing exception to limitation on period of probation).

(5) Mason also claims that the sentence is excessive, harsh, cruel, and unusual, and he contends that the sentencing judge had a “conflict of interest,” unfairly took into consideration Mason’s “past record,” and failed to follow the recommendation of probation and parole. All of Mason’s claims are without merit and/or are not subject to appellate review.

(6) On a VOP, the Superior Court has the authority to require that the defendant serve the entire balance of any Level V sentence that was suspended for probation.<sup>4</sup> In this case it is clear from the record that the sentence was properly imposed within statutory limits. The claim that the sentence is harsh, excessive, cruel, and unusual is without merit.

(7) Mason contends that the sentencing judge had a “conflict of interest” because he was not the same judge who presided over Mason’s prior VOPs. The claim is without merit. A probationer is entitled to a “prompt hearing before a judge of the Superior Court on the charge of violation.”<sup>5</sup> A probationer is not entitled to a hearing before a specific judge.

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<sup>4</sup> Del. Code Ann. tit. 11, § 4334(c). *Sample v. State*, 2012 WL 193761 (Del. Supr.) (citing *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999)).

<sup>5</sup> Del. Super. Ct. Crim. R. 32.1(a). *Piper v. State*, 2010 WL 2574173 (Del. Supr.); *Johnson v. State*, 2010 WL 2169509 (Del. Supr.); *Mayfield v. State*, 2003 WL 1711946 (Del. Supr.).

(8) The claim that the Superior Court unfairly considered Mason's "past record" is not reviewable in the absence of a transcript of the November 10, 2011 VOP proceedings. Mason did not order transcript for this appeal.<sup>6</sup> The failure to include adequate transcript of the trial court proceedings precludes appellate review of a claim of error with respect to the proceedings.<sup>7</sup>

(9) Finally, Mason contends that the sentencing judge failed to follow the recommendation of probation and parole.<sup>8</sup> The claim is without merit. The Superior Court is not obligated to follow a sentencing recommendation made by a probation officer.<sup>9</sup>

NOW, THEREFORE IT IS HEREBY ORDERED that the motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland  
Justice

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<sup>6</sup> *Tricoche v. State*, 525 A.2d 151, 154 (Del. 1987).

<sup>7</sup> *Id.*

<sup>8</sup> Without the transcript, it is impossible to know what the probation officer recommended at the hearing. The probation officer's September 29, 2011 written report recommends, in the event of a finding of guilt, that the Superior Court sentence Mason to a total of six years at Level V suspended after one year for one year at Level IV VOP Center and then discharge Mason as unimproved on all charges.

<sup>9</sup> *Cruz v. State*, 990 A.2d 409, 417 (Del. 2010) (holding that the Superior Court had discretion to impose a prison term notwithstanding the probation officer's recommendation to the contrary).